84-1748

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROYCE DAVID HEBERT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. WHAT STANDARD SHOULD BE APPLIED TO REVIEW A WARRANT CONTAINING INFORMATION GAINED FROM AN ADMITTEDLY ILLEGAL PRIOR SEARCH OF THE SAME PREMISES: THE *FRANKS* "REDACTION" ANALYSIS APPLIED BY THIS COURT IN *U.S. V. KARO* OR THE "ATTENUATION" ANALYSIS UTILIZED BY THIS COURT IN *SEGURO V. U.S.?*

2. WHETHER THE FRUITS OF A RESIDENTIAL SEARCH SHOULD BE ADMITTED WHERE A SUBSTANTIAL PORTION OF THE SEARCH WARRANT AFFIDAVIT FOR THOSE PREMISES WAS COME AT BY THE EXPLOITATION OF A PRIOR, ILLEGAL, WARRANTLESS SEARCH OF THOSE SAME PREMISES, THAT SAME DAY?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	II
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF RELEVANT FACTS	3
CONTESTED SEARCH	3
THE WARRANT TO SEARCH HEBERT'S RESIDENCE WAS BASED UPON AFFIANT BRAZIEL'S SURREPTITIOUS, WARRANTLESS ENTRY UPON THOSE PREMISES	3
SURREPTITIOUS, WARRANTLESS ENTRY NOT MENTIONED IN AFFIDAVIT	4
FRUITS OF ILLEGAL SEARCH OF PRIVATE RESIDENCE UTILIZED AS PROBABLE CAUSE TO OBTAIN WARRANT FOR SUBSEQUENT SEARCH OF THAT SAME ABODE	5
MOTION TO SUPPRESS	6
REASONS FOR GRANTING THE WRIT	7
1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ANALYSIS IN *SEGURA V. UNITED STATES*	7
THIS COURT HAS SUGGESTED SOMETHING MORE THAN SIMPLE *FRANKS* ANALYSIS IS NEEDED	7
WHAT TEST TO APPLY: "REDACTION" VS. "ATTENUATION" ANALYSIS	8
2. EVEN IF THE *FRANKS*' "REDACTION" ANALSIS WERE APPROPRIATE, THE TRIAL COURT'S EXORCISM WAS INSUFFICIENT TO REMOVE THE TAINT	11
CONCLUSION	13
CERTIFICATE OF SERVICE	14
APPENDIX A—Opinion of the United States Court of Appeals, Fifth Circuit	A-1

TABLE OF AUTHORITIES

CASES	Page
Brown v. Illinois, 442 U.S. 590, 600 (1975)	8
Dunnaway v. New York, 422 U.S. 200 (1975)	8
Fixwell v. Wainwright, 492 F.2d 480 (5th Cir. 1974)	6
Florida v. Royer, 460 U.S. 491 (1983)	8
Franks v. Delaware, 438 U.S. 154 (1978)	8, 9, 11
Oliver v. U.S., 104 S.Ct. 1735, 1742-3, n.12	6
Segura v. United States, 468 U.S.____, 82 L.Ed.2d 599 (1984)	7, 8, 9, 10
U.S. v. Cruz, 581 F.2d 535 (5th Cir. 1978)	8
U.S. v. Davis, 423 F.2d 974 (5th Cir. 1970)	6
U.S. v. Karo, 468 U.S.____, 82 L.Ed.2d 530 (1984)	8, 9
U.S. v. Parker, 772 F.2d 179 (5th Cir. 1983)	8
Wong Sun v. United States, 371 U.S. 471 (1963)	9

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Royce David Hebert, the Petitioner herein, prays that a Writ of Certiorari, issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause February 11, 1985.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 753 F.2d 1301 and is printed as Appendix "A" hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1985 and the mandate returned on

March 5, 1985. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) by timely filing this Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in Court Below:

On May 3, 1983, Petitioner ROYCE DAVID HEBERT was charged in a four count indictment with conspiring to distribute [Count One], aiding and abetting the distribution [Count Two] and unlawfully distributing [Count Four] marijuana.

Prior to trial, Petitioner Hebert moved to suppress all evidence seized from his Austin, Texas home (evidence which served as the only basis implicating Hebert in this offense) arguing that same was the fruit of a prior illegal warrantless search of those same premises.

Although agreeing that the prior warrantless entry of his property by DEA Agent Braziel constituted a "severe invasion" of Hebert's premises, the District Court, after hearing on his Motion, denied same.

Consequently, Hebert entered a plea of guilty to one count of conspiracy [21 U.S.C. § 841(a)(1)], reserving his right to appeal the District Court's denial of his motion to suppress. On March 23, 1984, Appellant was found guilty and sentenced to five years incarceration and a $15,000 fine. On the 11th day of February, 1985, the Fifth Circuit Court of Appeals affirmed Appellant Hebert's conviction. While agreeing with the District Court that Agent Braziel's entry on the premises was illegal, the Court below concluded that the warrant was based on sufficient probable cause and Agent Braziel's prior illegal observations constituted "only a small part of the information presented to the magistrate".

Appellant timely files this Application for Certiorari, seeking review by this Court.

STATEMENT OF RELEVANT FACTS

CONTESTED SEARCH

On November 2, 1982, Federal, State and local officers searched Appellant Hebert's residence at 1713 Sylvan Drive, Austin, Texas, seizing the only evidence implicating Hebert in this offense [Rec. Vol. X, p. 10-11].

It is this search, based upon a warrant obtained and executed by DEA Agent Richard Braziel, that is the subject of this appeal.

THE WARRANT TO SEARCH HEBERT'S RESIDENCE WAS BASED UPON AFFIANT BRAZIEL'S SURREPTITIOUS, WARRANTLESS ENTRY UPON THOSE PREMISES

Agent Braziel's sworn affidavit to search Hebert's Sylvan Drive property recited observations Braziel ob-

tained by surreptitiously entering upon those same residential premises the day before.

> "The surveillance observed Aaron Maxwell, a Black male, exit JoJo's restaurant [sic] and enter the blue and white 1977 Chevrolet . . . and drive it to 1713 Sylvan Drive, in Austin, Texas, a few blocks from the JoJo's restaurant [sic]. S/A Braziel observed the vehicle pull into the garage and the garage door then closed. S/A Braziel further heard a car trunk lid being opened. Further, S/A Braziel heard a noise like heavy objects being thrown in a trunk of a vehicle, after which the trunk lid slamed [sic]. The garage door opened and blue and white Chevrolet bearing 1984 Texas License plate PCQ658, driven by Aaron Maxwell backed out of the garage." [Rec. Vol. X, p. 144].

SURREPTITIOUS, WARRANTLESS ENTRY NOT MENTIONED IN AFFIDAVIT

However, what was not mentioned in the affidavit provided to the Magistrate is that Agent Braziel accomplished these observations only by surreptitiously entering Hebert's residential property, "creeping up" next to Hebert's house and pressing his nose and ear against the garage door. [Rec. Vol. X, at 55].

From this distance, with his nose pressed up to the garage door, Agent Braziel testified he "heard the trunk lid open on the vehicle", what he believed to be ". . . heavy object being thrown into the trunk" and smelled what he said was the "odor of marijuana coming from the . . . garage door" [Rec. Vol. X, p. 55].

FRUITS OF ILLEGAL SEARCH OF PRIVATE RESIDENCE UTILIZED AS PROBABLE CAUSE TO OBTAIN WARRANT FOR SUBSEQUENT SEARCH OF THAT SAME ABODE

As a result of what Agent Braziel allegedly heard and smelled while the Chevrolet was at the Sylvan Drive address he ordered the arrest of Allen Granger, who was observed leaving the restaurant parking lot in that same Chevrolet which Aaron Maxwell had driven from the residence on Sylvan Drive [Rec. Vol. X, pp. 56-71]. Agent Braziel stated that after Granger's arrest he could detect the same "strong odor of marijuana coming from the 'vehicle' in which Granger was arrested" [Rec. Vol. X, pp. 56-7, 102]. This statement was in turn included in Braziel's affidavit as part of the probable cause asserted for the warrant to search Hebert's house on Sylvan Drive [Rec. Vol. II, p. 145].

Again, what Agent Braziel did not mention in his affidavit for a warrant to search Hebert's residence is the fact that the probable cause for arresting Granger in the first place was based in large part upon Agent Braziel's illegal observations at those same premises.

Here, Granger's arrest in the Chevrolet automobile was based, in substantial part, upon the fruits of the prior illegal, surreptitious entry of Hebert's Sylvan Drive residence and the fact that Braziel overheard what he believed to be the loading of the vehicle's trunk and smelled what he believed to be marijuana emanating from the garage where the Chevrolet was located. The government then utilized the fruits of that arrest as probable cause to re-enter and search that same residence.

MOTION TO SUPPRESS

Prior to trial Hebert moved to suppress the evidence discovered as a result of the search of his Sylvan Drive residence on November 2, 1982 [Rec. Vol. V, p. 111], arguing that Agent Braziel's initial warrantless activities in the bushes next to Hebert's garage door the day before constituted an illegal search and that without the fruits of this initial illegality or the stale information recited in the affidavit, probable cause to search the residence was lacking [See: Rec. Vol. V, pp. 105-109].

After hearings on the Motion to Suppress, the Trial Court concluded that when Agent Braziel surreptitiously entered Hebert's residential property "at night" and listened at the garage door, "pressing his nose to that door", same "constituted an invasion of the curtilage of that property sufficient to constitute a search without a warrant" [Rec. Vol. I, p. 15], noting that:

> "The curtilage of a private home is given a greater privacy expectation than an ordinary building or automobile. . . . These facts present a *severe invasion of privacy.*" (emphasis supplied) District Court's Order [Rec. Vol. I, p. 15].[1]

As a remedy for this "severe invasion" of Hebert's privacy the trial Court applied a *Franks v. Delaware* analysis and "struck from the affidavit" only the "statement in the affidavit regarding the three thuds heard

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1. See: *Fixell v. Wainwright*, 492 F.2d 480 (5th Cir. 1974) and *U.S. v. Davis*, 423 F.2d 974 (5th Cir. 1970) where the Court held a government agent's nighttime entry into an unfenced yard surrounding a private residence constituted a *"severe invasion of privacy"*. And see: *Oliver v. U.S.*, 104 S.Ct. 1735, 1742-3, n. 12, where this Court reaffirmed it's "recognition that the curtilage remains within the protection of the Fourth Amendment".

by Agent Braziel" while pressed against Hebert's garage door [Rec. Vol. I, p. 15].

The trial Court left undisturbed, however, Braziel's recitation that "[A]t the time of [Granger's] arrest Agent Braziel noticed the odor of marijuana coming from Granger's vehicle" [Rec. Vol. I, p. 13], even though there could be little question that Braziel's decision to arrest Granger in that vehicle was based in substantial part on the fact that Braziel had heard what he believed to be the loading of the auto's trunk and smelled what he believed to be the same odor of marijuana while that vehicle was inside Hebert's garage.

In effect the trial court allowed Braziel to utilize as support for a warrant to search a private residence, information gained as the result of an arrest which itself was based in substantial part upon a prior illegal entry of that very same residence that same day.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ANALYSIS IN *SEGURA V. UNITED STATES*:

THIS COURT HAS SUGGESTED SOMETHING MORE THAN SIMPLE *FRANKS* ANALYSIS IS NEEDED

In determining whether a search warrant for residential premises has been tainted by an admittedly illegal, prior, warrantless search of those same premises, the proper test is whether the prior illegal intrusion contributed "in any way to the discovery of the evidence seized under the warrant". *Segura v. U.S.* 468 U.S.____, 82 L. Ed.

2d 599 (1984). Such an "attenuation" test looks to whether the warrant search "was a means sufficiently distinguishable to purge the evidence of any taint arising from the entry". *Segura v. U.S.*, 468 U.S.____, 86 L.Ed.2d at p. 614. See also: *Brown v. Illinois*, 422 U.S. 590, 600 (1975); *Dunnaway v. New York*, 442 U.S. 200 (1975); *Florida v. Royer*, 103 S.Ct. 1319, 1328 (1983).

In applying such an "attenuation" analysis, this Court has looked to the purposefulness of the officer's conduct. *Brown v. Illinois*, 422 U.S. at p. 600 [listing the "purpose and flagrancy of the official misconduct" as a factor]; *U.S. v. Dunnaway, Supra; U.S. v. Parker*, 722 F.2d 179 (5th Cir. 1983); *U.S. v. Cruz*, 581 F.2d 535 (5th Cir. 1978) *en banc* [the information was discovered as a result of a search having no purpose other than their discovery].

There can be little doubt as to Agent Braziel's purpose in illegally entering the curtilage of Hebert's residence. It was to obtain information.

WHAT TEST TO APPLY: "REDACTION" VS. "ATTENUATION" ANALYSIS

A serious question in need of resolution is what test courts should apply when information obtained from a prior illegal entry is utilized to secure a warrant to re-enter and search those same premises: the *Franks* "redaction" analysis applied by the Court in *Karo* or the "attenuation" analysis utilized by the Court in *Segura*.

Three days before the decision in *Segura*, this Court in *U.S. v. Karo*, 468 U.S. 530, 82 L.Ed.2d 530 (1984) applied a *Franks v. Delaware* "redaction" analysis to

excise from a warrant information obtained by officers from the prior illegal monitoring of an electronic transponder placed within a home. *U.S. v. Karo, Supra,* at p. 544.

> "That information [from the beeper], which was included in the warrant affidavit, would also invalidate the warrant for the search of the house if it proved to be critical to establishing probable cause for the issuance of the warrant. However, if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid." *U.S. v. Karo, Supra,* at p. 544.

However, the Court took pains to note that the "monitoring of a electronic device such as a beeper is, of course, *less intrusive*" than a search. (emphasis supplied) *U.S. v. Karo, Supra,* at p. 541.

Conversely, the prior illegality here, just as that in *Segura* constituted a prior illegal *entry* onto private premises.

The police in *Segura* had illegally entered an apartment the day before a search warrant was obtained and executed for those premises. Unlike the instant facts, the affidavit there did not contain any information obtained as a result of the initial entry. Thus, the Court could have used the "redaction" analysis from *Franks v. Delaware* to sustain the validity of the search conducted pursuant to the warrant.

Instead, the Court, citing *Wong Sun v. United States,* 371 U.S. 471 (1963), focused upon whether the search warrant was a means sufficiently distinguishable to purge the evidence of any taint arising from the prior entry,

Segura, Supra, at p. 608. The Court ultimately concluded that suppression of the fruits of the search conducted pursuant to a warrant was unnecessary because "the illegal entry into [defendants'] apartment did not contribute in any way to discovery of the evidence seized under the warrant." The Court observed:

> "None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged. This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of a search, that search, wholly unrelated to the prior entry. The valid warrant search was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the entry." *Segura v. U.S., Supra,* 82 L.Ed.2d at p. 614.

It would be difficult to argue seriously that Agent Braziel's illegal observations at the Sylvan Drive residence the day before he included same in his warrant affidavit "did not contribute in any way to the discovery of evidence seized under the warrant", *Segura v. U.S.,*____ *Supra,* at p. 614.

The warrant to search Hebert's residence is not "attenuated" from, but rather is substantially based upon the prior illegal entry of that same residence, on that

same day. Agent Braziel's purpose in entering those premises was to gain information regarding the Chevrolet vehicle he had seen enter the garage. It was what Braziel heard and smelled while the car was inside that caused him to stop that vehicle and it was what he smelled at the time he arrested its occupants that he related to the Magistrate as probable cause to re-enter and search Hebert's residence. The sequence of these events are inextricably intertwined with the Agent's initial illegal entry of those premises. The fruits of these peradventures should have been suppressed. This Court should grant the Petition for Writ of Certiorari.

2. EVEN IF THE *FRANKS*' "REDACTION" ANALYSIS WERE APPROPRIATE, THE TRIAL COURT'S EXORCISM WAS INSUFFICIENT TO REMOVE THE TAINT.

As a remedy for what the trial Court below described as a "severe" invasion of Hebert's privacy, that Court excised the portion "regarding the three thuds heard by Agent Braziel".

If, as both Courts below suggest, the eavesdropping at the garage door constituted a "severe invasion of [Hebert's] privacy", then the only other information that was acquired by these officers which could have possibly ripened into probable cause was the odor of marijuana emanating from Granger's car after he was arrested.

However, arrest was based upon Agent Braziel's belief that marijuana was secreted in Granger's vehicle. Granger's car was seized because of what Agent Braziel had heard and smelled while eavesdropping at petitioner's garage door.

"Q. Why did you decide to stop and arrest Mr. Granger in the Chevrolet automobile?

A. Based on everything I just got through saying I felt like the vehicle was loaded with marijuana and no surveillance officers saw anything removed from the trunk of the car."

Therefore, Granger's arrest and the subsequent smell of marijuana from the Chevrolet are the direct fruit of Braziel's prior "severe invasion of privacy" of petitioner's home. Accordingly, it should not serve as probable cause to re-enter and search the same residence with a warrant.

To do so would allow officers to lift an illegal search by its own bootstraps, converting a prior illegal, warrantless search into probable cause to issue a warrant for the same residence.

Properly redacted, the affidavit did not set forth probable cause for a search of either 1713 Sylvan Drive or Granger's car.

It is clear that the trial court properly excised the portion of the affidavit "regarding the three thuds heard by Agent Braziel." However, at a minimum, the trial court should as well have excised that portion of the affidavit which recites that Agent Braziel smelled the odor of marijuana emanating from the trunk of the car in which Granger was arrested; that arrest being the direct and temporally proximate result of a prior warrantless illegal search of the very premises which the officers sought to reenter and search.

Agent Braziel should not have been allowed to utilize as support for a warrant to search this private residence

information gained as a result of an arrest which was itself based in substantial part upon a prior illegal entry of that same residence. The fruits of that search should have been suppressed. The Petition for Writ of Certiorari should be granted.

CONCLUSION

There is a serious question in need of resolution as to what test courts should apply when information obtained from a prior illegal entry is utilized to secure a warrant to re-enter those same premises. The recent decisions of the Honorable Court are in conflict. A Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit and resolve this dispute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been mailed to the U.S. Attorney's Office, Western District of Texas, on this the 3d day of May, 1985.

GERALD H. GOLDSTEIN

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Clifford J. ANTONE,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Royce David HEBERT,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Mikal Habeeb AMUNY,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Aaron MAXWELL,
Defendant-Appellant.

Nos. 84-1299, 84-1302, 84-1308 and 84-1315.

United States Court of Appeals, Fifth Circuit

February 11, 1985.

Pursuant to their pleas, defendants were convicted in the United States District Court for the Western District

of Texas, James R. Nowlin, J., on marijuana conspiracy charges, and they appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) probable cause existed for warrantless arrests of certain defendants at restaurant; (2) district court had a sufficient factual basis to accept certain defendant's guilty pleas; (3) defendant, whose fingerprints were found only on a spiral-ring notebook in the house, lacked standing to contest search of the house which was found to have contained marijuana; and (4) search warrant was based on sufficient probable cause even without evidence supplied by DEA agent's illegal entry into house; thus, trial court's redaction of the search warrant and ruling admitting the evidence obtained in the search of defendant's residence were correct.

Affirmed.

Edward C. Prado, U.S. Atty., Sidney Powell, Archie Carl Pierce, Asst. U.S. Attorneys., San Antonio, Tex., for plaintiff-appellee.

Charles R. Burton, Michael Tigar, Amanda Birrell, Austin, Tex., for Antone.

Gerald H. Goldstein, Ralph A. Lopez, San Antonio, Tex., for Hebert.

Dick DeGuerin, Houston, Tex., for Amuny.

Michael Kennedy, Joseph Calluori, New York City, for Maxwell.

Appeals from the United States District Court for the Western District of Texas.

Before GEE, REAVLEY and RANDALL, Circuit Judges.

GEE, Circuit Judge:

The appellants, Clifford J. Antone, Mikal Habeeb Amuny, Aaron Maxwell, and Royce Hebert, were indicted on charges relating to marijuana possession and distribution. After the district court denied their pretrial motions to suppress evidence, the appellants each pleaded guilty to one count of conspiracy, reserving their rights to appeal the district court's rulings to this Court. We hold that the district court's rulings were correct and affirm the appellants' convictions.

The charges against the appellants in this case arise from the same factual background. Each appellant, however, advances different arguments in this appeal. Our opinion therefore first presents a summary of the facts of the case and then separately analyzes each appellant's claims.

I. Facts

During late October 1982, United States Customs Officer David Harrison received information from a confidential informant who had previously provided Harrison with information that led to six arrests and five convictions on marijuana charges. The informant stated that Allan Granger and a person named Randy were to meet Clifford Antone and Mikal Amuny in Austin, Texas to obtain a quantity of marijuana. The informant also said that the marijuana was to be flown to Austin, but that he did not know where the plane was to land.

Officer Harrison immediately relayed this information to Drug Enforcement Administration (DEA) Agent Richard Braziel in Austin. Agent Braziel called Robert Nesteroff, a narcotics officer with the Texas Department of Public Safety, and asked him to conduct surveillance of

Antone's and Amuny's residences and of a club operated by Antone. Nesteroff did so, but observed nothing out of the ordinary.

On November 1 the informant told Officer Harrison than Granger was in the Austin area and that the marijuana had arrived there. The informant stated that Granger was to meet Antone and Amuny at 7:00 that evening to receive the marijuana, adding that Granger was driving a white and blue Chevrolet Monte Carlo with Texas license number PCQ-658. Harrison relayed this information to Braziel. Braziel, who had been investigating Antone and Amuny since 1979, knew from another reliable informant that Antone usually conducted drug transactions in the parking lots of Jo-Jo's and Denny's restaurants located at the intersection of Oltorf Street and Interstate 35 in Austin and that Antone used a black or Hispanic male to make the pick up and delivery.

Agent Braziel and several other agents established surveillance of the residences of Antone and Amuny and of the Jo-Jo's and Denny's restaurants. Between 7:00 and 7:30 p.m., Braziel saw Antone in the Jo-Jo's parking lot standing next to a black Lincoln Continental registered to Amuny and talking with an unidentified black male. A second black male, later identified as appellant Aaron Maxwell, climbed out of a Chevrolet pickup camper and walked over to Antone and the unknown man. The three men talked briefly, and Antone and the unknown man then left in the Lincoln. Maxwell followed in his camper, and the two vehicles arrived at Antone's house a short time later.

Officer Nesteroff had been watching Amuny's residence, where a blue Oldsmobile was parked. At about 7:00 p.m., a Buick registered to Amuny arrived. Shortly thereafter,

Maxwell arrived in the camper, parked, and drove away in the blue Oldsmobile. Maxwell drove first to one of Antone's nightclubs, then to Jo-Jo's restaurant. Meanwhile, the agents at Antone's residence observed Amuny's Buick parked on the wrong side of the street and blocking Antone's driveway. Antone and Amuny got into the Buick and drove to Jo-Jo's. Agents at Jo-Jo's spotted Granger's Monte Carlo at Jo-Jo's at this time.

Ten minutes later, Maxwell left in Granger's Monte Carlo and drove to a nearby convenience store where he made a brief telephone call. He then drove to a house at 1713 Sylvan Drive that the agents believed to be a "stash house" for marijuana. Royce Hebert was the owner of this house. Maxwell drove into the garage, closing the garage door behind him. Agent Braziel, pursuing the car on foot, ran beside the house and hid in bushes near the garage. Braziel heard "thuds" of something heavy being put into the trunk of the car and then heard the trunk lid slammed. The garage door opened and Maxwell drove the car away. Braziel then approached the garage and was able to smell marijuana when he put his nose close to the door.

Maxwell drove Granger's car back to Jo-Jo's and went inside. After a few minutes Granger left the restaurant, got into his car, and drove away. The agents followed Granger to the first traffic light on an access road to the interstate and blocked his car. As the agents approached his car, they noticed a strong odor of marijuana. The agents arrested Granger and later obtained a warrant to search Granger's car. The search disclosed 56 pounds of marijuana in the trunk.

Meanwhile, other agents arrested Antone, Amuny, and Maxwell as they were leaving the restaurant. The agents

also obtained a search warrant for the house on Sylvan Drive. The search of that house disclosed a basement full of marijuana and that the two upstairs bedrooms were being used for growing, drying, and packaging marijuana. The agents also found several firearms in the master bedroom and scales and marijuana processing equipment in the hall closet. The agents found over 800 pounds of marijuana in the house, along with numerous documents and ledgers indicating marijuana buyers, amounts purchased, and prices.

After the appellants' arrest, a grand jury returned a three-count indictment against them, which was superceded by a four-count indictment. This indictment charged the appellants with distribution of marijuana, possession of marijuana with intent to distribute, and conspiracy to distribute and to possess with intent to distribute marijuana. The appellants made several pretrial evidentiary motions, which the district court denied. The appellants then entered into plea agreements under which they pleaded guilty to one count of conspiracy and preserved their rights to appeal the district court's rulings on their pretrial motions. The district court accepted the appellants' guilty pleas, sentenced each appellant to five years imprisonment, and fined each $15,000.

II. Discussion of Appellants' Cases

A. Appellant Clifford J. Antone

Antone appeals from the district court's ruling that the agents had sufficient probable cause to arrest him at Jo-Jo's without a warrant and the court's refusal on that basis to suppress his arrest and the search of his person made incident to the arrest. Antone also argues that he

pleaded guilty involuntarily and that the district court had an insufficient factual basis upon which to accept his guilty plea.

1. *Warrantless Arrest*

[1, 2] Antone contends that the agents lacked probable cause to arrest him at Jo-Jo's without a warrant. Probable cause to arrest exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. *United States v. Woolery,* 670 F.2d 513, 515 (5th Cir.), *cert. denied,* 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982). The probable cause issue must be analyzed under the "totality of the circumstances" as to whether there is a "fair probability" that a crime is occurring. *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); *United States v. Marbury,* 732 F.2d 390, 395-96 (5th Cir. 1984). The probable cause requirement does "not demand any showing that such a belief is correct or more likely true than false." *Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983).

[3] The facts of this case indicate that the agents had probable cause to arrest Antone and to conduct a search incident to the arrest. Before Antone's arrest, the agents had received specific and detailed information concerning the marijuana transaction from informants who had provided reliable information in the past. The informants told the agents when, where, and how the transaction would occur. The agents' surveillance corroborated the informants' tips. These facts, viewed in the totality of the circumstances, established probable cause. *See United States v. Cisneros-Mireles,* 739 F.2d 1000, 1002-03 (5th

Cir. 1984); *United States v. Mendoza,* 722 F.2d 96, 101-02 (5th Cir. 1983).

2. *Factual Basis of Guilty Plea*

Antone next contends that the district court erred in accepting his guilty plea because the government failed to establish a sufficient factual basis of his guilt. Antone argues that the facts the government offered show merely that Antone was in the Jo-Jo's restaurant at the time the alleged criminal activity occurred, adding that the district court had no basis to conclude that he understood the charges against him at the time he pleaded guilty because the district court did not inform him of the "esoteric nature of the conspiracy count."

[4, 5] These contentions are meritless. To support a guilty plea, the prosecutor must present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty. *United States v. Davila,* 698 F.2d 715 (5th Cir. 1983). At the re-arraignment hearing (at which the district court accepted the appellants' guilty pleas), the prosecutor set forth the facts he expected the evidence at trial to show and read pertinent portions of the indictment. He stated that he would introduce evidence to show that the agents observed Antone talking with a black male in Jo-Jo's parking lot on the evening of November 1 and that the agents observed Amuny and Antone drive together from Antone's residence to Jo-Jo's that evening. The prosecutor also stated that he would show that personal documents belonging to Antone were found in the agents' search of the house on Sylvan Drive and that the agents found a beeper device on Antone's person and a corresponding beeper in the house.

Finally, the prosecutor stated that eight telephone calls were made from July 1 to October 16, 1982, between a phone used by Allan Granger and Antone's residence or the beeper found on Antone at the time of his arrest. The prosecutor's presentation of these facts provided the district court with a sufficient basis on which to conclude that Antone was guilty of the offense to which he was pleading guilty.[1]

In addition, the district court followed the dictates of Rule 11 of the Federal Rules of Criminal Procedure to the letter at Antone's sentencing hearing in assessing whether Antone understood the charge against him and the significance of his guilty plea. *See United States v. Araiza,* 693 F.2d 382, 384 (5th Cir. 1982). The court specifically asked Antone whether he had committed the offenses charged, and Antone answered, "Yes, sir." The court then asked Antone: "That's what you are pleading guilty to?" and Antone again replied "Yes, sir." Moreover, Antone was represented by two competent and experi-

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1. In addition, each defendant was present when the indictment was read in open court. Count One, to which the defendants pleaded guilty, stated in pertinent part:

> On or about November 1st, 1982, in the Western District of Texas and diverse other places to the grand jurors unknown Defendants Clifford J. Antone, Mikal Habeeb Amuny, Allan Joseph Granger, Royce David Hebert also known as Roy Sneed, and Aaron Maxwell unlawfully, willfully, knowingly did combine, conspire, confederate and agree together and with each other to distribute and possess with intent to distribute marijuana, a Schedule 1 controlled substance contrary to Title 21, United States Code, Section 841(a)(1) and in violation of Title 21, United States Code, Section 846.

Thereafter the court addressed each in identical terms regarding the charge. Antone's colloquy with the court was as follows:

> THE COURT: Mr. Antone, is that what you did?
> MR. ANTONE: Yes, sir.
> THE COURT: That's what you are pleading guilty to?
> MR. ANTONE: Yes, sir.

enced criminal trial attorneys during this phase of the proceedings. Nothing in the record indicates that Antone failed to understand the charges against him. *See United States v. Dayton,* 604 F.2d 931, 938 (5th Cir. 1979) (en banc), *cert. denied,* 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980).

3. *Voluntariness of Antone's Plea*

[6] Antone's final contentions concern the voluntariness of his guilty plea and alleged government misconduct. Antone contends that the government deceived him by stating that only Royce Hebert had standing to object to the search of the house on Sylvan Drive. Because of this "misrepresentation," Antone argues, he believed that the evidence seized in the search of the house could be used against him at trial. Therefore, Antone contends, he pleaded guilty involuntarily. Antone also claims that the government violated its plea agreement with him by providing Texas authorities with information that they used to levy a sales tax on the marijuana transactions in which Antone took part.

These contentions are meritless. The record discloses no action or misrepresentation by the government that prevented Antone from establishing his standing to contest the search. *See Rakas v. Illinois,* 439 U.S. 128, 133-34, 99 S.Ct. 421, 425-26, 58 L.Ed.2d 387, 394-95 (1978). Furthermore, the record indicates that Antone had no reasonable expectation of privacy in the house. Finally, the record contains no evidence regarding the Texas tax authorities on Antone's alleged tax liability. This issue is therefore not properly before us.

B. Appellant Mikal Habeeb Amuny

Amuny argues on appeal that the agents lacked probable cause to arrest him at JoJo's restaurant and that the district court had an insufficient factual basis upon which to accept his guilty plea.

1. *Warrantless Arrest*

Amuny contends, as did Antone, that the agents lacked probable cause to arrest him as he left Jo-Jo's restaurant. Amuny's argument is identical to Antone's on this point. For the reasons stated in the discussion of Antone's argument on this issue, we hold that the district court correctly ruled that the agents had sufficient probable cause to arrest Amuny without a warrant.

2. *Factual Basis of Guilty Plea*

[7] Amuny also contends that the district court had an insufficient factual basis on which to accept his guilty plea. As we have noted earlier, the prosecutor must present evidence sufficient to provide the district court with a basis to conclude to the court's subjective satisfaction that a defedant is guilty of the offense to which he is pleading guilty before the court can accept the guilty plea. *United States v. Davila,* 698 F.2d 715 (5th Cir. 1983). Here, the prosecutor's summary of evidence to be presented at trial (which Amuny quotes and adopts as his statement of what the evidence would have shown) indicates that the district court had ample facts to satisfy itself of Amuny's guilt. These facts included evidence of Amuny's fingerprints, personal belongings, and transaction records found in the house on Sylvan Drive and testimony concerning Amuny's association with the other defendants. The district court did not err in accepting Amuny's guilty plea.

C. Appellant Aaron Maxwell

The sole issue that Maxwell raises on appeal is whether the district court properly denied his motion to suppress evidence taken from the house on Sylvan Drive. After Maxwell's arrest and indictment, he sought to challenge the agents' search of the house. Maxwell contends that he had standing to contest this search and that the magistrate lacked probable cause to issue the warrant. In ruling on Maxwell's motion to suppress, the district court concluded that Maxwell had no standing to object to the search. The court also ruled that the agents' affidavit supporting their request for a search warrant contained sufficient facts to establish probable cause and to justify the magistrate's issuance of a search warrant.

[8-10] We conclude that the district court correctly ruled that Maxwell lacked standing to contest the search of the house on Sylvan Drive. A defendant has the burden of establishing his right to contest a search or seizure of a person or property. *United States v. Salvucci,* 448 U.S. 83, 86, 100 S.Ct. 2547, 2549-50, 65 L.Ed.2d 619, 624-25 (1980). To establish standing to contest a search, the defendant must show that he had a "legitimate expectation of privacy" in the area search. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387, 401 (1978). A defendant's legitimate presence on the searched premises, without more, is insufficient to establish standing. *Id.* at 142-43, 99 S.Ct. 430, 58 L.Ed.2d at 400-01.

[11] Under the standard the Supreme Court has set forth, Maxwell has no standing to contest the search of the house. The agents found no clothes or personal belongings of Maxwell's in the house. Maxwell's fingerprints were found only on a spiral-ring notebook in the house.

The only evidence Maxwell presented to the district court in support of his contention were Maxwell's own affidavit and an affidavit of Royce Hebert. The district court's conclusion that Maxwell had no legitimate expectation of privacy in the house and that Maxwell therefore lacked standing to contest the search was correct. *See United States v. Briones-Garza,* 680 F.2d 417, 420 (5th Cir.), *cert. denied,* 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 181 (1982). The probable cause issue is discussed in the next segment of our opinion.

D. Appellant Royce Hebert

After his arrest and indictment, Hebert moved to suppress all evidence seized from the house on Sylvan Drive, which was his residence. Hebert argued that Agent Braziel's entry onto the premises without a warrant when Maxwell drove into the garage tainted the search of the house conducted after the agents had obtained a warrant. Because of this taint, Hebert contends, the district court was required to suppress the evidence seized in the search as a "fruit of the poisonous tree."

The district court agreed that Braziel's entry onto the premises was illegal. The court, however, refused to suppress the evidence, ruling that even absent Braziel's observations sufficient probable cause existed to justify the issuance of the search warrant. The court therefore used the remedy the Supreme Court authorized in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and "purged the taint" by redacting the portions of the agents' affidavit that related to Braziel's illegal entry. On appeal, Hebert contends that the district court's redaction remedy was insufficient to purge the evidence of the taint of Braziel's illegal entry and that the court should have suppressed the evidence.

[12, 13] A court should interpret a search warrant and its supporting probable cause in a realistic and commonsense manner. *United States v. Maestas,* 546 F.2d 1177, 1180 (5th Cir. 1977). Viewing the search warrant involved here in this manner, we conclude that the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry. The affidavit the agents submitted to the magistrate to support their request for a search warrant set out numerous facts in great detail; Agent Braziel's observations constitute only a small part of the information presented to the magistrate. The district court's redaction of the search warrant and the court's ruling on the admissibility of the evidence obtained in the search of Hebert's residence were correct.

For the reasons stated, we conclude that the district court's evidentiary rulings and the court's acceptance of the appellants' guilty pleas were correct. The judgment of the district court is therefore

AFFIRMED.